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(1)

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

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**No. 898**

**MORTIMER SINGER, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. A 1-6; 1/R. 144)<sup>1</sup> is reported at 326 F. 2d 132.

## **JURISDICTION**

The judgment of the court of appeals was entered on January 6, 1964 (Pet. App. B 7; 1 R. 145). A petition for rehearing was denied on February 10, 1964 (Pet. App. C 8; 1 R. 146). The petition for a writ of certiorari was filed on March 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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<sup>1</sup> "R.", preceded by volume number, designates the eleven-volume record on file with the Clerk of this Court.

### QUESTIONS PRESENTED

1. Whether a criminal defendant is constitutionally entitled to a nonjury trial if the government does not consent to his waiver of a jury.

2. Whether prejudicial error resulted from statements made by government counsel and instructions given by the court.

### CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. Article III, Section 2 of the United States Constitution provides in pertinent part:

\* \* \* \* \*

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; \* \* \*

2. The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury \* \* \*.

3. Rule 23(a) of the Federal Rules of Criminal Procedure provides:

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

### STATEMENT

After a jury trial held in the United States District Court for the Southern District of California petitioner was convicted on twenty-nine counts of a thirty-count indictment (1 R. 2-34)\* charging viola-

\*The jury acquitted petitioner on count 12 (1 R. 118; 10 R. 964).

tions of the mail fraud statute, 18 U.S.C. 1341 (1 R. 113-114; 10<sup>a</sup> R. 964-965).<sup>\*</sup> Counts 1 through 17 charged the deposit of mail in furtherance of a scheme to defraud, and counts 18 through 30 charged receipt of mail to that unlawful end. Petitioner was sentenced to concurrent 18-month prison terms on counts 1 through 11, and to three years' probation on counts 13 through 30, to commence at the expiration of his prison sentence, with probation conditioned on his payment of a \$250 fine on each of counts 13 through 30 (1 R. 126-127; 10 R. 995-996). The court of appeals unanimously affirmed. (Pet. App. A 1-6; 1 R. 144; 326 F. 2d 132).

The evidence, which is not in issue, shows that petitioner, using the name Ralph E. Hastings, devised and executed a scheme to defraud amateur song lyric writers by means of false and fraudulent pretenses, representations and promises. These false representations, contained in literature mailed by petitioner, were essentially that he was the operator of a legitimate song servicing and marketing enterprise which, for specified fees, would have songs arranged, orchestrated, recorded commercially and exploited for the benefit of the song writers. The evidence reveals that petitioner never did, nor did he intend to, carry out these promises.

Prior to trial petitioner filed a memorandum offering to waive trial by jury "for the purpose of shortening the trial" (1 R. 64). The court expressed its

<sup>\*</sup> The trial court entered a judgment of acquittal as to co-defendant Stephen Francis Singer at the close of the government's case in chief (8 R. 756).

willingness to accept such a waiver (2 R. 12), but the government refused to consent to a nonjury trial (2 R. 19). The case was, therefore, tried to a jury.

#### ARGUMENT

Petitioner's principal contention is that a criminal defendant has an absolute constitutional right to a nonjury trial if he chooses to waive trial by jury. We submit that the court of appeals and the district court correctly rejected this argument because no such right is granted by the Constitution either expressly or by implication.

1. Article III, Section 2 of the Constitution provides explicitly that the trial of all criminal cases other than impeachments "shall be by Jury." In *Patton v. United States*, 281 U.S. 276, this Court rejected the view that this provision was jurisdictional and that a court was powerless to conduct a criminal trial, even with the consent of all parties, without a common-law jury. The Court noted in *Patton* that rather than being jurisdictional, Article III, Section 2 "was meant to confer a right upon the accused which he may forego at his election." 281 U.S. at 298.

This application of Article III, Section 2 renders its effect similar to that of the Sixth Amendment, which expressly confers on a criminal accused the right to trial "by an impartial jury." But neither Article III, Section 2, nor the Sixth Amendment states or suggests that the converse is true—i.e., that a criminal defendant enjoys an absolute constitutional right to a nonjury trial. For there is an obvious logical and legal distinction between a defendant's

right to demand a constitutionally guaranteed procedure and the right sought here by petitioner—i.e., to prevent that procedure from being used at his trial. The undisputed right of a defendant to waive the former does not necessarily confer the latter right upon him.

2. Moreover, the policy embodied in Article III, Section 2 is more than a bare recognition of a right which the defendant alone may forego. As this Court observed in *Patton* (281 U.S. at 312):

Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.

This recognition in *Patton* of the fact that trial by jury in criminal cases is not waivable by the defendant's action alone is supported by decisions in various courts of appeals which have sustained criminal convictions after trials by jury notwithstanding pretrial jury waivers by defendants. See *United States v. Dubrin*, 93 F. 2d 499, 505 (C.A. 2), certiorari denied, 303 U.S. 646; *Rees v. United States*, 95 F. 2d 784, 790-791 (C.A. 4); *Mason v. United States*, 250 F. 2d 704, 706 (C.A. 10); *Dixon v. United States*, 292 F. 2d 768, 769 (C.A. D.C.).<sup>\*</sup> Rule 23(a) of the Federal Rules of

<sup>\*</sup> The fact that in some of these cases it was the court which refused to approve a nonjury trial rather than the government

**Criminal Procedure, which embodies this policy and which was applied in this case, was foreshadowed not only by *Patton* but by *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-278, in which the Court observed:**

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, *where the Government also consents, and where such action is approved by the responsible judgment of the trial court.* [Emphasis added.]

Assuming, *arguendo*, that the denial of a nonjury trial under some circumstances might be so unfair as to present constitutional questions under the Due Process Clause of the Fifth Amendment, petitioner's sole asserted motive in this case in waiving a jury was "for the purpose of shortening the trial" and not because a jury trial was likely to be unfair. Under the present circumstances, therefore, petitioner had no greater constitutional right under Article III, Section 2 to a nonjury trial than a defendant would have under the same constitutional provisions if he waived trial in the district where the offense was committed and moved for transfer to another district. In neither instance does

is no ground of distinction. If the right to a nonjury trial were absolutely guaranteed by the Constitution, as petitioner contends, it would be no more subject to the supervisory discretion of the district court than is its counterpart—the right to trial by jury.



the waiver of the right expressly provided in these sections entitle the accused to his alternative demand.\*

3. Petitioner's subsidiary claims of error were carefully reviewed and rejected by the court of appeals. There is no merit to the contention (Pet. 29-34) that the court of appeals disregarded the provisions of Rule 52, which permits a court to notice plain error although not objected to below. As to the alleged misconduct by government counsel, the court found, after "a review of the record" that petitioner was not deprived of a fair trial. As to the court's instructions, the court of appeals found not only that petitioner did not object, but also that the instructions were "adequate and accurate". These conclusions do not warrant further review by this Court.

a. With reference to argument of counsel, petitioner contends that government counsel in his opening statement referred to the anticipated testimony of a Mr. Berg, who, the prosecutor explained, "was engaged in dealing with amateur songwriters with Mr. Singer for the period of mid '55 through 1957" (3 R. 22). During the trial the court concluded that

\* The state cases which petitioner cites (Pet. 11) are not in point. In some there was government consent to the waiver, and consequently the courts were not faced with the issue involved here. *E.g.*, *People v. Scudieri*, 383 Ill. 84; *State v. Zabrocki*, 194 Minn. 346; *State ex rel. Warner v. Baer*, 103 O.S. 585. Others involved an interpretation of a specific statutory provision which made it mandatory for the court to try the case without a jury upon the defendant's request, regardless of the prosecution's objection. *E.g.*, *People v. Spegal*, 5 Ill. 2d 211.



Berg's testimony was not admissible on the issue of fraudulent intent since it was too remote in point of time (4 R. 226; 7 R. 527-536). Both during the trial and in his concluding instructions, the trial judge explicitly informed the jury that they were to determine the truth of the charges contained in the indictment "on the basis of the proof offered in the record, not on the basis of the opening statement of either side or of arguments of counsel" (8 R. 703; 10 R. 945).

Petitioner also claims (Pet. 28) prejudice from counsel's use of the word "forgery" in closing argument. However, immediately after the remark was made, the court instructed the jury to disregard the statement and permitted defense counsel to read to the jury from the trial transcript on the point in issue (11 R. 35, 43-45).

b. As to the instructions, there was neither objection nor error. The trial court carefully and fully instructed on the issue of intent in terms of the offense of mail fraud as defined in the statute (10 R. 947-957). The jury was not instructed that petitioner's misrepresentations had to be relied upon because it is not necessary to show reliance in order to prove a mail fraud violation. See *United States v. Bloom*, 237 F. 2d 158, 162 (C.A. 2).

The trial court did not instruct that all the testimony of a witness must be disregarded by the jury if he testified falsely as to any matter (Pet. 24). The judge actually charged in this connection that a

"witness false in one part of his or her testimony is to be distrusted in others" and that all of the testimony of such a witness must be rejected unless the jury "shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars sworn to the truth" (10 R. 944).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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